Before the
Federal Communications Commission
Washington, DC

In the Matter of	)	MM Docket No. 99-232
	)	
Amendment of Section 73.202(b),	)	
Table of Allotments,	)	RM-9321
FM Broadcast Stations	)	
(Fort Bridger, WY and Hyrum, UT)	)	

To: **Chief, Allocations Branch**

MOTION TO STRIKE

KGNT Inc., by its attorney, hereby submits a Motion to Strike the "Reply Comments" and the "Response to Reply Comments" filed by M. Kent Frandsen in this proceeding. With respect thereto, the following is stated:

Background

Frandsen has been playing fast and loose with the Commission's procedural rules throughout this proceeding. L. Topaz Enterprises ("L. Topaz") was the licensee of Station KNYN, Channel 256C3, which is assigned to Fort Bridger, Wyoming. L. Topaz initiated this to reallot Channel 256C3 from Fort Bridger, Wyoming to Hyrum, Wyoming. In doing so, L. Topaz claimed that the community of Hyrum was entitled to a "first local service" preference and that the reallotment would result in a preferential arrangement of allotments. M. Kent Frandsen ("Frandsen") then filed an application for Commission consent to purchase Station KNYN,[1] and subsequently the Commission released a *Notice of Proposed Rule Making*, DA 99-1233 (Chief, Policy and Rules Div. June 25, 1999) ("NPRM"). In the *NPRM*, the Commission requested that

[1] File No. BAPH-990119GQ. According to Commission records, the sale was approved on April 1, 1999, and was consummated on June 22, 1999.

the petitioner file a potential gain and loss and study, and provide a Tuck[2] analysis to show that Hyrum is sufficiently independent of Logan to merit a "first local service" preference.

On the required filing date, neither Frandsen nor L. Topaz provided neither requested showing. Although Frandsen acknowledged the filing requirement, in his Comments he stated that he was "not prepared to address either the Tuck issue or to demonstrate gain and loss area at this time." *Comments* at 1. Nevertheless, no extension of time of the filing deadline was sought. KGNT opposed the reallotment. Consequently, on August 31, 1999, the date for filing "reply comments," Frandsen ultimately provided the required showing as part of his *Reply Comments*. KGNT simultaneously filed *Reply Comments* requesting the dismissal of the Hyrum proposal due to the failure of any party to timely provide the required showings.

On September 27, 1999, Frandsen apparently then filed a "Response to Reply Comments." As explained below, that pleading which was an unauthorized pleading that also constituted an impermissible *ex parte* communication. *Inter alia*, Frandsen asserted that his late-filed showing loss/gain area showing and *Tuck* analysis should be accepted, arguing that the Commission previously, in past cases, has accepted late-filed comments supporting an allotment proposal, and that therefore, his late-filed interest in applying for and constructing facilities on Channel 253C3 at Hyrum could be filed "later in the rulemaking process." *Response to Reply Comments* at 2.

As seen below, Frandsen's late-filed showing, as well as his unauthorized *ex parte* pleading, both should be stricken. Moreover, even his arguments are considered on their merits, the proposal Frandsen has inherited should be denied.

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[2] *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

I. The Showing Contained in Frandsen's "Reply Comments" Should Be Stricken

First of all, as an initial matter, Frandsen's late-filed gain/loss study and Tuck showing both should be stricken. The Commission regularly requires the timely-filing of the minimal threshold information it requires for processing rulemaking petitions. *See, e.g., Amor Family Broadcasting Group v. FCC*, 918 F.2d 960 (D.C. Cir. 1990) (requiring timely-filed expressions of interest in a rulemaking proceeding); *Brookville and Punxsutawney, PA*, 3 FCC Rcd 5555, 5556 ¶ 9 (Policy & Rules 1988) (requiring timely filed reimbursement commitments in the course of initial Comments). Frandsen's analogizes his late filing to equivalent of a late-filed "expression in interest." *Response to Reply Comments* at 2, ¶ 2. While Frandsen is correct that in certain instances the Commission will permit a late-filed expression of interest:

> Late-filed expression of interests have been accepted and considered only in a situation where there is no opposition to the channel proposals and where there would be no adverse impact on another pending proposal. *See, Santa Isabel, Puerto Rico*, 3 FCC Rcd 2336 (1988), *Aff'd*, 4 FCC Rcd 3412 (1989); *aff'd sub nom. Amor Family Broadcasting v. FCC*, 918 F. 2d 960 (D.C. Cir. 1990).

Hazelhurst and Bude, MS, 10 FCC Rcd 2164 n.3 (Allocations Branch 1995).

Here, Frandsen's showing is objectionable and properly rejected for two reasons. First, since this is a contested proceeding, Commission precedent does not allow Frandsen to simply cure his late filing at will. As the Commission stated in *Santa Isabel, Puerto Rico and Christiansted, VI*, 3 FCC Rcd 2336 (1988):

> The Commission's procedural rules are designed to provide adequate time and opportunity for interested parties to fully participate in the decision making process and to avoid prejudice to competing parties by providing predictable, uniformly applicable rules. They also permit the Commission to conduct its business within a reasonable period of time so as to avoid undue delay in the provision of service to the public. Accordingly, the Commission has required adherence to appropriate administrative standards. Furthermore, it may dismiss requests which fail to meet these standards. In

> Table of Allotment rule making proceedings, the Commission requires an expression of interest in a proposed channel in order to conduct the rule making process in an orderly manner. ....[T]he requirement of an expression of interest is reasonable and necessary to the efficient conduct of the agency's business, and the Commission has good reason to preserve the integrity of its processes by requiring adherence.
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> The Commission is aware of no case, and the parties have failed to cite an allotment case, where an untimely expression of interest was considered in the face of a conflicting proposal. ...[T]he Commission [has] issued a Public Notice setting forth a strict policy requiring adherence to filing deadlines. Pursuant to this policy, applicants seeking waiver of the deadline must demonstrate unusual or compelling circumstances which prevent timely filings. The Commission deemed this policy necessary and reasonable to assure that all applicants are treated fairly and reasonably in dealing with Commission processes and to guarantee an identifiable point when the Commission can close the door to new applications, thereby assuring that it can efficiently and effectively fulfill its public interest mandate. In the application context, to consider a late filed application is generally unfair to competitors and delays the provision of new service to the public. Similar concerns prevail in contested allotment proceedings.
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> * * *
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> [A]s noted by the Bureau in the Memorandum Opinion and Order, acceptance is limited to situations where there is no opposition to the channel proposals and where there would be no adverse impact on another pending proposal.

Id. at 2337 ¶¶ 10-14.

In this case, since there *was* and *continues to be* an "opposition to the channel proposal," acceptance of Frandsen's late-filed showing would not be appropriate, and as such, Frandsen's argument to the contrary should be rejected. Not only would such acceptance be contrary to Commission policies, the showings' acceptance would effectively sanction a tactic that potentially would wreak havoc with the Commission's pleading cycles and deadlines in contested rulemaking proceedings. In this case, for example, ordinarily the regular (and proper) sequence of events would be for Frandsen to file his required showings in his Comments, and for any parties wishing to comment on that showing to have the opportunity to react to such a showing in the already-established "reply" period. Frandsen's tactic, if permitted, effectively "cuts-off" the ability for opposition reply comments to be filed by the public during any pleading cycle established by the

Commission's rules, since the Commission's rules do not contemplate the filing of pleadings beyond the comment and reply comment periods set forth in the Notice and the comment deadline set forth in the Public Notice announcing the filing of the counterproposal. *See, e.g., Rose Hill, Trenton, Aurora and Okracoke, NC*, 11 FCC Rcd 21223, 21224 n.5 (Chief, Allocations Branch 1996). The result is a situation such as that presented here, where KGNT was forced to request that it be "reserve[d] the right to respond and/or reply to the showings, in the event they are accepted by the Commission party" (KGNT *Reply Comments* at 2), and to thereby prolong the completion of this proceeding. There was and is no good reason for Frandsen to have caused this to occur. Just as Frandsen was able to file a gain-loss/Tuck showing on August 31, 1999, he presumably should have been equally capable of doing so two weeks earlier, on August 16, 1999, on the proper deadline date. His choice not to do so, as his *Comments* indicate, was purely *voluntary*. In the interest of administrative regularity, and consistent with Commission precedent, Frandsen's late-filed showing should not be accepted.

Moreover, the Commission also should determine that Frandsen *still* has yet filed a valid expression of interest. In its "Comments," Frandsen stated:

> Frandsen is currently a principal in applications to construct two new stations that would serve areas similar to that proposed for service by the relocated KNYN. If these applications are granted, Frandsen would withdraw his expression of interest, and ask that the channel remain in Ft. Bridger.

Comments at 1. Similarly, in its *Response to Reply Comments*, Frandsen states:

> Frandsen may withdraw this interest and ask that the channel remain in Fort Bridger, as stated in his Comments filed on August 16, 1999, it either of his two new station applications, are granted in the September 28 auction of new broadcast channels.

Response to Reply Comments at n.3.

As such, these alleged "expressions of interest" are merely equivocal and on their face contingent, and therefore are not acceptable. *Caldwell, College Station and Gause, TX*, 13 FCC Rcd 13772, 13780 ¶ 22 (1998) (commitment to apply to construct and operate a station "to the extent that [the multiple ownership rules] would allow him to do so" was deemed "equivocal and did not constitute a valid expression of interest").[3]

In short, the Commission's rules establishing pleading cycles in rule making proceedings provide for "comments" and for "reply comments." The only way that an opponent can provide meaningful rebuttal to any information filed by a petitioner in response to an *NPRM* is through the timely submission of information. Frandsen failed to do so. His attempts to supplement the record through a late filed submission (*i.e.*, a showing that only was submitted in "reply comments") should be stricken.

II. Frandsen's "Response to Reply Comments Should Be Stricken

Moreover, Frandsen's "Response to Reply Comments" also should be stricken.

First of all, as Frandsen implicitly acknowledges, this is an unauthorized pleading. The Commission's rules do not contemplate the filing of pleadings beyond the comment and reply comment periods set forth in the Notice and the comment deadline set forth in the Public Notice announcing the filing of the counterproposal. *See, e.g., Rose Hill, Trenton, Aurora and Okracoke, NC*, 11 FCC Rcd 21223, 21224 n.5 (Chief, Allocations Branch 1996); *Charlotte*

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[3] It also should be noted that Frandsen was the prevailing party in the recent auction for MX Group FM 44, Channel 298C, Sun Valley, Idaho, under the name of "Sun Valley Radio, Inc." Therefore, it appears that his contingency (*i.e.*, "if either of his two new station application... are granted") is about to blossom into reality, which would trigger his statement that he "would withdraw his expression of interest." *Comments* at 1.

Amalie, Cruz Bay, VI, et al., 10 FCC Rcd 8111 n.6 (Chief, Allocations Branch 1995); *Nowata and Collinsville, OK*, 10 FCC Rcd 7159 ¶ 1 (Chief, Allocations Branch 1995). Consequently, Frandsen's "Response to Reply Comments" should be stricken.

Moreover, the pleading was filed in violation of the Commission's *ex parte* rules, insofar as neither KGNT nor its counsel was served with a copy of the pleading, *despite the fact that on its face it seeks to respond to the Reply Comments filed by KGNT, Inc.*[4] Under the Commission's Rules, this rulemaking proceeding is a restricted proceeding. 47 C.F.R. § 1.1208. Under the Commission's rules, "any party to a proceeding who directly or indirectly violates or causes the violation of any provision of this subpart... may be disqualified from further participation in that proceeding." 47 C.F.R. § 1.1216(a).

Since the pleading is an unauthorized *ex parte* pleading filed outside of the Commission's permitted pleading cycle, Frandsen's "Response to Reply Comments" should be stricken.[5]

III. On the Merits, Frandsen's Petition Should Be Denied

Finally, Frandsen's "Response to Reply Comments," to the extent the matters discussed therein are still at all considered by the Commission, and to the extent Frandsen's tactics prevented a timely submission of a "reply" by KGNT to its showing, the following arguments responding to Frandsen's substantive showing should be considered.

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[4] The fact that neither KGNT nor counsel were ever served with the pleading is evident from a review of the pleading, insofar as no "Certificate of Service" was filed as a part of the pleading.

[5] The document's existence was fortuitously discovered through a routine review by counsel of the Commission's Electronic Comment Filing System. The existence of the pleading was discovered just yesterday, on October 25, 1999.

In order to change city of license, an applicant must ordinarily show (1) that the proposed reallotment community is to a location that satisfies the Commission's criteria as constituting an actual "community"[6]; (2) that the change of city of license would result in a preferential arrangement of allotment[7]; (3) if an proponent is claiming a "first local service" preference, that the proposed reallotment will not merely provide additional service to an already well served urbanized area[8]; and (4) that existing service will not be withdrawn from an underserved area.[9] Although since KNYN is not already on the air, no showing under factor four is needed in this case (Shelby and Dutton, MT, 19 99 FCC LEXIS 2959 (1999)), a showing still must be made under factors 1-3.

Although as to the first factor, it appears that since Hyrum is incorporated, "Hyrum" is indeed a "community," as to the second factor, Frandsen's showing falls short. The Commission's has an established allotment criteria[10] which was set forth initially in Revision of FM Assignment Policies and Procedures, 90 F.C.C.2d 88 (1982), which establish the following allotment priorities:

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[6] *See, e.g., Spencer and Webster, Massachusetts*, 13 FCC Rcd 18797, ¶ 3 (Chief, Aloocations Branch 1998).

[7] *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

[8] *See, e.g., Refugio and Taft, TX*, DA 99-1377, ¶ 6 (July 16, 1999).

[9] *See, e.g., Refugio and Taft, TX*, DA 99-1377, ¶ 4 (July 16, 1999).

[10] *See Pecos and Wink, TX*, 14 FCC Rcd 2840, ¶ 5 (Chief, Allocations Branch 1999) ("[i]n considering a reallotment proposal, the Commission compares the existing allotment versus the proposed allotment to determine whether the reallotment will result in a preferential arrangement of allotments. This determination is based upon the FM allotment priorities set forth in Revision of FM Assignment Policies and Procedures ("FM Priorities"), 90 FCC 2d 88 (1982)").

(1) first full-time aural service

(2) second full-time aural service

(3) first local service

(4) other public interest matters;

Co-equal weight is given to priorities (2) and (3). Although Frandsen's correctly notes that the proposed reallotment would provide Hyrum with its "first local transmission service" (Reply Comments at 2), which is priority "(3)," as Frandsen's own engineering shows, the allotment, as it *currently* exists, at Fort Bridger will provide service to a "white area," which is allotment preference "(1)." The "white area" consists of 3,267 persons. Frandsen *Reply Comments* at Exhibit B. Thus, grant of the L.Topaz/Frandsen's proposal would *not* result in a "preferential arrangement of allotments," and must be denied for that reason, alone. *Accord, Pecos and Wink, Texas*, 14 FCC Rcd 2840, 2841 ¶ 5 (Chief, Allocations Branch 1999).

Moreover, Frandsen's showing with respect to the independence of Hyrum also is insufficient. To establish independence, the Commission looks at several criteria:

> Those criteria are: (1) the extent to which community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's local needs and interests; (3) whether the community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools and libraries.

Bay Springs and Ellisville, MS, DA 99-498, n.8 (Chief, Allocations Branch 1999).

Frandsen's late-filed showing consists exclusively of self-serving statements, and contains no independent evidence establishing Hyrum's "independence." As such, that showing, as well, must be rejected.

Conclusion

In short, Frandsen's showing is replete with procedural and substantive deficiencies preventing its grant. As such, it must be denied.

WHEREFORE, it is respectfully requested that this Motion to Strike be granted, and that the information and arguments presented herein by fully considered by the Commission.

Respectfully submitted,

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By: _____
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October 26, 1999

CERTIFICATE OF SERVICE

I, Dan J. Alpert, hereby certify that on October 26, 1999 the foregoing document is being served by First Class Mail, postage prepaid, to the following persons:

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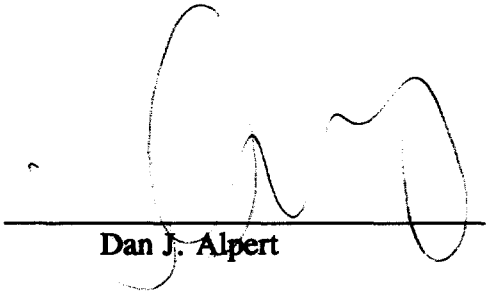

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